NO. 83-1130

IN THE

Supreme Court of the United States

October Term, 1983

GERALD D. BAIR, DIRECTOR OF REVENUE OF THE IOWA DEPARTMENT OF REVENUE; IOWA DEPARTMENT OF REVENUE; IOWA RAILWAY FINANCE AUTHORITY; MAURICE E. BARINGER, TREASURER OF IOWA AND CUSTODIAN OF THE SPECIAL RAILROAD FACILITY FUND; RAYMOND L. KASSEL, DIRECTOR OF TRANSPORTATION OF THE STATE DEPARTMENT OF TRANSPORTATION; STATE TRANSPORTATION COMMISSION OF THE STATE DEPARTMENT OF TRANSPORATION; and STATE DEPARTMENT OF TRANSPORTATION,

Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE FAILWAY COMPANY; BURLINGTON NORTHERN RAILROAD COMPANY; CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY; ILLINOIS CENTRAL GULF RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR; AND UNION PACIFIC RAILROAD COMPANY,

Respondents,

IOWA RAIL SHIPPERS ASSOCIATION

Intervenor-Respondent.

BRIEF OF THE STATES OF ALABAMA, ARKANSAS, COLORADO, CONNECTICUT, HAWAII, LOUISIANA, MINNESOTA, MONTANA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, VERMONT, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

William J. Guste, Jr.
Attorney General of Louisiana
7th Floor
2-3-4 Loyola Building
New Orleans, LA 70112
(504) 568-5575

(Additional List of Counsel on Inside Front Cover)

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

Charles A. Graddick
Attorney General of Alabama
Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

John Steven Clark
Attorney General of Arkansas
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Duane Woodward
Attorney General of Colorado
State Services Building
1525 Sherman St., 3rd Floor
Denver, Colorado 80203
(303) 866-3611

Joseph I. Lieberman
Attorney General of Connecticut
30 Trinity Street
Hartford, Connecticut 06106
(203) 566-3747

Tany S. Hong
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Hubert H. Humphrey, III
Attorney General of Minnesota
102 State Capitol
St. Paul, Minnesota 55155
(612) 297-4272

Mike Greely
Attorney General of Montana
215 N. Sanders Justice Bldg.
Helena, Montana 59620
(406) 449-2026

Gregory H. Smith
Attorney General of New Hampshire
State House Annex
25 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3658

Paul Bardacke
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504
(505) 827-6000

Robert O. Wefald
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

Anthony J. Celebrezze, Jr.
Attorney General of Ohio
Michael H. Igoe
Mark G. Kelsey
Assistant Attorneys General, Transportation Section
State Office Tower
30 E. Broad Street
Columbus, Ohio 43215
(614) 466-3376

John J. Easton, Jr.
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

Chauncey H. Browning, Jr.
Attorney General of West Virginia
State Capitol
Charleston, West Virginia 25305
(304) 348-2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

TABLE OF AUTHORITIES—Continued

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I. INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 36.1, the signatory states submit this Brief as *Amici Curiae* in

support of the Petition for a Writ of Certiorari in the above-captioned case. Since this Brief is being sponsored and filed by the aforementioned states, consent to its filing is not required. United States Supreme Court Rule 36.4.

II. OPINIONS BELOW

The Opinion of the Iowa Supreme Court is reported at 338 N.W.2d 338 (Iowa 1983). Copies of the Opinion, the Iowa Supreme Court's denial of a petition for rehearing, and the unreported Opinion of the Polk County District Court are contained in Petitioner's Appendix at 1-110.

III. INTEREST OF AMICI CURIAE

The interests of the states joined as Amici in this Brief concern what they believe to be the far reaching effects of the opinion of the Iowa Supreme Court as it relates to taxation of rail carriers and to state rail rehabilitation programs.

The Decision of the Iowa Supreme Court which invalidates a reasonable excise tax under 49 U.S.C. §11503 (b) (4) has serious consequences for states other than Iowa since rail carriers pay state excise taxes. In addition, the Commerce Clause and Supremacy Clause issues raised, but not decided, in the Iowa Supreme Court impact upon the state taxing power and state rail rehabilitation

programs. It is essential that this Court agree to hear the Petition of the State of Iowa so as to provide guidance to states and to taxpayers.

IV. ARGUMENT

A. The 4-R Act

The question of whether §306(1) (d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), codified as 49 U.S.C. §11503(b) (4), implicates state excise taxes, and not merely property taxes, is of enormous import to the states. If §306(1) (d) applies to state excise taxes, states will have to carefully examine their excise taxes with the goal of restructuring those taxes to remove indications of perceived differential tax treatment of rail carriers. Such state excise taxes would include those reasonable forms of taxation, historically and commonly in effect, such as income taxes, sales and use taxes, business license taxes, and gross receipts taxes.

Traditionally, this Court has readily reviewed federal statutory limitations on state taxing power in recognition of the substantial federal questions raised with concomitant need for guidance by states and affected taxpayers. *See e.g. Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979); *Memphis Bank & Trust Company v. Garner,* — U.S. —, 103 S.Ct. 692 (1983); *First Agricultural National Bank v. Massachusetts Tax Commission,* 392 U.S. 339 (1968).

It is unclear, on the face of §306 of the 4-R Act, whether state excise taxes are implicated. Appendix at

111-113. With the exception of the "any other tax" language, the entire section relates solely to property taxation. The definitions in §306(3) concern only *property* taxes. Express prohibited tax schemes in §306(1) (a) - (c) implicate *property* taxes. Federal District Court jurisdiction is conferred in §306(2) to review discriminatory *property* taxes. Use of sales assessment ratio studies, a *property* tax tool, is in §306(2) (e). The comparison class for discriminatory property tax purposes is commercial and industrial property. No comparison class is listed in §306 to determine discrimination for excise tax purposes, which indicates that Congress was not concerned with state excise taxes. Within the overwhelming property tax context of the statute, the inclusion of the three words "any other tax" does not suggest an intent to encompass state excise taxes within the purview of §306.

The legislative history of §306 indicates that Congress was concerned with discriminatory state property taxes, and not with state excise taxes. The Senate Conference Report, in commenting upon the scope of §306, stated Congressional intent was to limit "the provision to taxation of railroad property." 2 *U.S. Code Cong. & Ad. News,* 148, 181. In light of this report and the ambiguity of §306, it is reasonable to conclude that Congress was not concerned in the 4-R Act with addressing state excise taxes imposed upon rail carriers.

This Court, in a series of cases, has expressed a "clear statement" rule of statutory construction that principles of federalism require ambiguities in Congressional Acts limiting state authority, as in §306 of the 4-R Act, be construed to narrow rather than expand the scope of the federal legislation. *See e.g. United States v. Bass,*

404 U.S. 336 (1971); *Rewis v. United States*, 401 U.S. 808 (1971). The Iowa Supreme Court should have applied the "clear statement" rule so as not to oust the traditional and fundamental right of a state to enact a reasonable excise tax.

This Court has not addressed the question of whether the 4-R Act implicates state excise taxes. This Court can now resolve this issue and provide guidance to states in structuring their excise taxes.

Even if a state excise tax is within scrutiny under §306(1) (d), the Iowa Supreme Court's employment of a "competitive disadvantage" test to determine whether a state excise tax discriminates against a rail carrier should be reviewed by this Court. That test has ramifications far beyond the Iowa Court's decision.

Under the competitive disadvantage test, a state tax impacting upon a rail carrier is invalid if the economic burden in comparison to other transportation modes, operates to impose what a court perceives as a heavy burden upon a rail carrier, in relation to benefits received by the carrier directly from the tax, notwithstanding that another similar competitive carrier, such as a truck, is actually taxed at a higher tax rate upon the identical tax base, for example, in this case, fuel consumed for vehicle propulsion purposes. This test actually is totally concerned with the expenditure of the tax funds rather than the facial structure of state tax laws. Under §306 of the 4-R Act, comparison for discrimination should focus solely upon state tax laws. Worse yet, this test was applied by the Iowa Court to compare the economic burden upon rail

carriers with other dissimilar transportation modes, involving barges and aircraft.

B. Commerce Clause

The question of whether the Iowa Railway Vehicle Fuel Tax (Iowa Code chapter 324A (1983)) violated the Commerce Clause was properly argued, but not decided, in the Iowa Supreme Court. The Commerce Clause issues relate to the applicability of "user fee" case principles and the viability of the "taxable moment" doctrine. In regard to user fees, rail carriers argued that a state tax imposed upon their transportation activities had to be analyzed under principles justifying state user fees. *Cf. Evansville-Vanderburgh Airport Authority District v. Delta Airlines,* 405 U.S. 707 (1972). If a state decides to engage in a rail rehabilitation program to be financed, in part, by nondiscriminatory taxes on rail carriers, the Commerce Clause should not require the state to provide state-owned rail facilities to every taxed rail carrier as a precondition for tax validity. *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977). In regard to the viability of the taxable moment doctrine (*Southern Pacific Co. v. Gallagher,* 306 U.S. 167 (1939)), the *Complete Auto Transit* case does not require an intrastate event upon which any state tax must hinge to satisfy Commerce Clause limitations.

C. Supremacy Clause

The Iowa Supreme Court considered, but did not decide, the issue of whether the Supremacy Clause prohibits a state from imposing a tax upon rail carriers to help finance a state program of rehabilitation of deteriorating

rail lines and to restore rail service on abandoned lines. The rail carriers alleged that the tax and the programs, authorized by Iowa Code chapter 307B (1983), inevitably conflicted with and were preempted by a "National Transportation Policy" contained in the Revised Interstate Commerce Act, 49 U.S.C. §10101 *et seq.* As noted in the Petition, the 4-R Act, P.L. 94-210, 90 Stat. 54, and the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895, encourage state involvement in rail rehabilitation programs. *See* 49 U.S.C. §§1654(f), 10101a, 10905, 10910.

While the deterioration of rail lines in the United States is certainly a national problem with acute consequences for consumers, shippers, and rail carriers, the states should not be prohibited from pursuing state programs to enhance rail service. An improved enhanced rail service contributes to a robust economy while a deteriorated rail condition contributes to economic decline. Many communities in the various states are without rail service because of abandonment of rail lines by rail carriers. Restoration of rail service to such communities would not inevitably conflict with or be preempted by any perceived "National Transportation Policy." On the contrary, while federal funding is decreasing, the federal government is looking to states to play an increasingly important role in local transportation needs. The Iowa Court's decision thwarts that role.

V. CONCLUSION

The issues in the Petition vitally concern the *Amici* and represent important questions having enormous im-

pact in the field of state taxation and rail rehabilitation. Therefore, we urge this Court to grant the Petition for a Writ of Certiorari in the present case and give plenary consideration to the matter.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana